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No. 03-708

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PATRICK MORIARTY,

Petitioner,

v.

LYNN JACK BRADT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether review of *Moriarty v. Bradt* is appropriate when the New Jersey Supreme Court made a constitutionally sound grandparent visitation determination that comports with the United States Supreme Court decision of *Troxel v. Granville*?

2. Whether a "preponderance of the evidence" standard is appropriate when a fundamental interest is implicated and other sufficient constitutional safeguards exist?

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REASONS FOR DENYING THE PETITION

The facial constitutionality of the New Jersey Grandparent and Sibling Visitation Statute is not implicated here as petitioners solely attack the New Jersey Supreme Court's application of the state statute in *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003) (PA2)[1]. *See* N.J. STAT. ANN. § 9:2-7.1 (2003). However, the New Jersey State Supreme Court properly construed the New Jersey Grandparent and Sibling Visitation Statute, even fortifying its constitutional due process protection by ensuring that a parent's decisions were given special weight with the addition of a "harm to the child" standard.

Under *Moriarty*, New Jersey courts will presume that a fit parent makes a decision in the best interest of his or her child, and such presumption will not be overcome until the additional showing that "the child will be harmed without the visitation" is met. This decision is constitutionally sound and comports with the United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000).

The issues that arose as a result of the construction and application of the Washington Statute in *Troxel* did not exist in *Moriarty*. Simply stated, the Washington statute broadly allowed anyone to apply for visitation, and the statute was applied without affording the decisionmaking rights of the parents any heightened protection. *Troxel*, 530 U.S. at 67. The New Jersey Statute, on the other hand, permits only grandparents and siblings to seek visitation, and the New Jersey Supreme Court applied a heightened standard to protect the fundamental childrearing interest of the parent. *See* N.J. STAT. ANN. § 9:2-7.1 (2003); *Moriarty*, 177 N.J. at 114-16, 827 A.2d at 222-23 (2003).

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1. PA refers to Petitioner's Appendix.

Because the New Jersey Supreme Court took great care in balancing the best interests of the child with the fundamental rights of parents to care and raise a child by requiring proof of the potential for harm if the visitation were not granted as sought, this is not a case for review on Due Process grounds. The *Moriarty* Court recognized that the parent-grandparent tug of war over visitation was not a contest between equals, and appropriately placed the burden on the grandparent to prove that visitation is in the best interests of the child and that harm to the child would result if visitation was not granted as requested. These two tests provide sufficient constitutional protection to parental autonomy, such that a "preponderance of the evidence" evidentiary standard is sufficient. It was only fitting that this Court leave the determination of the due process standards to be applied up to the States, which are in the best position to balance public policy with the fundamental rights of its' state's constituents.

I. The Decision Of The New Jersey Supreme Court Is Constitutionally Sound And Comports With The United States Supreme Court Decision Of *Troxel v. Granville*

The New Jersey State Supreme Court has the duty and authority to enforce the public policy of New Jersey to preserve grandparent-grandchild relationships. The court made a constitutionally appropriate decision to award grandparent visitation in *Moriarty*, 177 N.J. at 84, 827 A.2d at 203, based on a sufficiently compelling justification of avoiding harm to the children at issue. Accordingly, the court's determination did not violate the Due Process Clause of the Fourteenth Amendment and presents no valid constitutional issue for this Court's review.

At issue is whether the New Jersey State Supreme Court's grandparent visitation determination violated the rights of the parent under the Due Process Clause of the Fourteenth Amendment. This Court traditionally begins its analysis of substantive due process issues by determining whether a fundamental liberty interest is implicated by the challenged state action. *See Troxel*, 530 U.S. at 86 (Stevens, J. dissenting); *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997). Government may not infringe on fundamental liberty interests unless the state action taken is narrowly tailored to serve a compelling state interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993).

Though the Supreme Court long ago recognized the fundamental liberty interest of parents in the "care, custody, and control of their children," it has equally recognized that a parent's right to make childrearing decisions is not absolute. *See Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (limiting a parent's authority if it appears his or her decisions will jeopardize the health or safety of a child or create a social burden); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (the state may restrict a parent's control in order to "guard the general interest in youth's well being"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty interest in bringing up children). As Justice Stevens stated in his dissenting opinion in *Troxel*:

> While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State . . . we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from

> any challenge absent a threshold finding of harm . . . [E]ven a fit parent is capable of treating a child like a mere possession.

Troxel, 530 U.S. at 86 (Stevens, J., dissenting opinion).

States have a compelling interest in protecting the health and well-being of their youth. A circumstance in which a child's safety, health or well-being is at risk demands state intervention, via the states' *parens patriae* authority to protect children from harm. *See Prince v. Massachusetts*, 321 U.S. at 166-67 ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare. . . ."). In nearly every aspect of life, government intrusion into a parent's right to rear children has been found to be appropriate and justified. Examples include laws governing the use of seat belts, disease vaccinations, compulsory education and child labor.

In addition to the laws each state designs to protect children, who may be particularly vulnerable in our society, the courts play a role in applying these laws, as well as reversing the decisions of parents whom the court determines may be putting their children at risk in some way.

For example, courts have specifically overridden the decisions of parents in cases where the parents refused to consent to medical treatment for a child and treatment could save the child's life. *See Parham v. J.R.*, 442 U.S. 584, 606 (1979) ("[T]he risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied."); *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 278 F. Supp.

488 (W.D. Wash. 1967) (Washington statutes empowering superior court judges to declare children to be dependent for purpose of authorizing blood transfusions of children against expressed objections of parents were not unconstitutional), *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962), *cert denied*, 371 U.S. 890 (appointing guardian to order blood transfusions for child against parents' wishes).

Likewise, courts play an important role in the child custody and visitation arena. Nationwide, states have enacted visitation statutes due, in some part, to the reality of the changing American family. *See Troxel*, 530 U.S. at 64. State legislatures, including New Jersey's, recognize that situations arise in which a child's third party relationship(s) may need protection to ensure that child's welfare. *Id.* For many years, courts have applied the best interests of the child standard as a basic tool in visitation proceedings regarding third-party visitation. *Id.* at 99 (Kennedy, J., dissenting opinion).

In *Troxel*, 530 U.S. at 57, this Court addressed the constitutionality of Washington State's Third-Party visitation statute, Wash. Rev. Code § 26.10.160(3) (1994). While reaffirming that the parental right to raise children is protected by the Due Process Clause of the Fourteenth Amendment, the plurality opinion in *Troxel* specifically declined to define the scope of the parental due process right in the visitation context – nor should this Court do so now.

The *Troxel* Court recognized the fact-specific nature of visitation determinations, and that Due Process is realized through the constitutional application of grandparent visitation statutes by the states:

> [W]e agree with Justice Kennedy that the constitutionality of any standard for awarding

> visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." Because much state-court adjudication in this context occurs on a case-by case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.

Id. at 73. Correspondingly, Justice Kennedy, in his dissenting opinion, noted "[F]amily courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise." *Id.* at 101(Kennedy, J. dissenting opinion).

Notably, the constitutionality of the New Jersey Statute was not challenged in *Moriarty*, 177 N.J. at 84, 827 A.2d at 203. Based on *Troxel* and New Jersey jurisprudence, the *Moriarty* Court combined the existing best interests of the child standard with the additional requirement that the grandparent seeking visitation prove harm to the child if the requested visitation were not granted. This ensured that proper deference would be given to parents' decisionmaking and, correspondingly, that Due Process would be accorded parents in the application of the statute. When this Court did not define the precise scope of the parental due process right in *Troxel*, it purposefully left the constitutional protection of this right to the States. *Troxel*, 530 U.S. at 73. Subsequently, the New Jersey State Supreme Court appropriately safeguarded the parent's fundamental right to raise his children in *Moriarty*, 177 N.J. at 84, 827 A.2d at 203.

Coincident to a thorough analysis of this Court's *Troxel* decision, the *Moriarty* Court carefully crafted a decision that

comports with the *Troxel* standards. In *Troxel*, the problem was not that the Washington Superior Court intervened in the grandparent visitation matter, but that when it did so, it gave no special weight to the parent's decision with regard to her child's best interests regarding visitation. *Troxel*, 530 U.S. at 69. The Washington Superior Court failed to protect the parent's fundamental right to childrearing when it "contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* In other words, when a fit parent's decision with respect to visitation is subject to judicial review, a court must accord some special weight to the parent's own determination, which the Washington Superior Court failed to do. *Id.* at 70.

To the contrary, in *Moriarty*, the New Jersey Superior Court accorded special weight to the parent's decision regarding grandparent visitation. As stated by the trial judge, "[I]n my decision I give great deference to Mr. Moriarty's request by way of visitation." Transcript of Decision on Plenary Hearing, N. J. Sup. Ct, Chancery Div., Doc. FM-02-7-97 (PA84.) *Inter alia*, the trial court incorporated the Family Services evaluation, testimony of the parties and witnesses, and testimony from an expert in custody matters in Her Honor's analysis and application of each of the statutory factors provided in New Jersey's Grandparent and Sibling Visitation statute. (PA73-84).

The New Jersey statute places the burden on the grandparent to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child. N.J. STAT. ANN. § 9:2-7.1 (2003). The statute does not address the impact on situations in which a parent makes an offer of visitation that a grandparent finds unacceptable. *Id.*

The trial court judge investigated whether the children would be harmed by a determination of visitation as offered by the parent. (PA84). The court heard testimony from a custody expert, who opined that the limited visitation offered by the parent would not have been sufficient to overcome the campaign of alienation that the parent and his wife had engaged in towards the grandparents – the expert was concerned that the children would associate themselves with the "evil" that their father conveyed to them about their mother, which could be very destructive psychologically to the children. (PA84.)

Although the trial judge stated that she gave deference to the parent's wishes, the perceived harm that could come to the children without regular and substantial visitation with their grandparents led Her Honor to ultimately order visitation that was more than what Mr. Moriarty offered but less than what the grandparents requested. (PA86).

The Appellate Division found no fault with the lower court's factual findings but overturned the decision, holding that interference with a fit parent's decision to afford limited visitation was constitutionally impermissible. (PA63-64). On review, the New Jersey Supreme Court in *Moriarty* was keenly aware that its determination of the grandparent visitation issue necessarily implicated a fundamental right, parental autonomy, and thus held that the New Jersey Grandparent Visitation Statute was subject to strict scrutiny. *Moriarty*, 177 N.J. at 103, 827 A.2d at 214.

The New Jersey Supreme Court interpreted *Troxel* to indicate that the "best interest" standard articulated in the Washington Statute was insufficient to serve as a compelling

state interest. *Moriarty*, 177 N.J. at 108, 827 A.2d at 217-18. Further, *Troxel* instructs that:

> [A] fit parent has a fundamental due process right to the care and nurturance of his or her children; that that right is protected where a nonparental visitation statute respects a fit parent's decision regarding visitation by (1) according him or her the "traditional presumption" that a fit parent acts in the best interests of the child; and (2) giving "special weight" to a fit parent's determination regarding visitation. *Id.*

Therefore, the New Jersey Supreme Court was careful to apply an analysis that would encompass the factors that the *Troxel* Court indicated appropriate for constitutional application of grandparent visitation statutes. The New Jersey Supreme Court noted that many other states' courts have undertaken a strict scrutiny review of grandparent visitation questions, with the majority of these courts having rejected any compelling interest short of harm to the health or welfare of a child. *Moriarty*, 177 N.J. at 109-110, 827 A.2d at 218-19. Indeed, prior to *Moriarty*, New Jersey jurisprudence established that:

> [T]he only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child. . . . [W]hen harm is proved and the presumption in favor of a fit parent's decisionmaking is overcome, the court must

> decide the issue of an appropriate visitation schedule based on the child's best interests.

Moriarty, 177 N.J. at 115, 827 A.2d at 222.

The New Jersey Supreme Court was satisfied that this Court's prior decisions fully support its conclusion that interference with the fundamental right to childrearing will be tolerated only to avoid harm to the health or welfare of a child. *Id.* Accordingly, the court held that a threshold harm standard must be applied, in addition to the provisions of the statute. *Moriarty*, 177 N.J. at 118, 827 A.2d at 224.

Taken together, the harm to the child standard, combined with the statutory factors (which are based on the best interests of the child), satisfy the Due Process Clause of the Fourteenth Amendment. *Troxel*'s indication that Due Process requires that special weight be afforded to a fit parent's determination regarding visitation is addressed, because the presumption that a fit parent makes a decision in the best interest of his or her child is not overcome until the additional showing of harm to the child has been met.

The state has a duty under the *parens patriae* doctrine, as well as a compelling interest, to safeguard the health, safety, and well-being of its children. It must balance these interests with their parent's fundamental right to raise their children as they see fit. Contrary to the Washington Supreme Court in *Troxel*, there was no presumption in favor of the grandparents in Moriarty. The New Jersey statute squarely places the burden of proof on the grandparents to prove that visitation is in the children's best interests, when the statutory factors are applied to the case. *See* N.J. STAT. ANN. § 9:2-7.1 (2003). The harm requirement provides the constitutional

protection that *Troxel* and New Jersey jurisprudence indicate is needed to constitutionally infringe on a parent's fundamental rights to raise his or her child. *Moriarty*, 177 N.J. at 114-15, 827 A.2d at 222.

This Court's decision to not articulate the precise scope of the parental due process right in the visitation context was sound. With the "almost infinite variety of family relationships that provide our ever-changing society," *Troxel*, 530 U.S. at 90, the state legislatures and courts are the proper venue to address these sensitive, fact-specific and often highly emotional visitation issues. As Justice Scalia stated in his *Troxel* dissenting opinion:

> I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people. *Troxel*, 530 U.S. at 93 (Scalia, J., dissenting opinion).

Indeed, the issue of grandparent visitation is one of the many important and delicate areas in the family law arena that depend on the states for formulation and interpretation. The fact that states may vary in their formulation of visitation standards is a by-product of this Court's acceptance, indeed, accedence to, the states' role in the formation of standards and the application of these standards to fact-sensitive family law cases. Each state has its own priorities, goals and legislative mandates, which the state courts must incorporate in their oversight roles as constitutional sentinels.

For example, states laws are written and/or interpreted differently and vary amongst the states regarding who may get married and/or receive the benefits of marriage, (*See* VT. STAT. tit. 15, § 1201 (2003) (same-sex couples may enter into civil union); FLA. STAT. ch. 741.212 (2003) (state does not recognize same-sex unions)), grounds for divorce, (*See* CAL. FAM. CODE § 2310 (2003) (marriage dissolution on the basis of irreconcilable differences or incurable insanity); TEX. FAM. CODE § 6.001-6.007 (2001) (grounds for divorce include insupportability, cruelty, adultery, conviction of felony, abandonment, living apart, and confinement in a mental hospital); 750 ILL. COMP. STAT. 5/401 (2003) (grounds for dissolution include impotence, habitual drunkenness for two years, infecting other spouse with a sexually transmitted disease, attempting to take the life of the other spouse by poison or means showing malice)), and the division of marital property (*See* CAL. FAM. CODE § 760 (2003) (property acquired during the marriage is community property); IDAHO CODE § 32-906 (2003) (property acquired during the marriage is community property); N.J. STAT. § 2A:34-23.1 (2003) (court considers factors in equitable distribution of property)). Similarly, the constitutional application of grandparent visitation statutes is properly situated with the states and further guidance from this Court is not necessary, absent a constitutional imperative.

II. The New Jersey State Supreme Court Approved An Appropriate Standard To Sufficiently Protect The Right Of Parents To Childrearing

As discussed *supra*, the *Troxel* Court acknowledged that it was not establishing the exact scope of the parental due process right in the visitation context. *Troxel*, 530 U.S. at 73. Indeed, the Court was hesitant to hold that specific

nonparental visitation statutes violate the Due Process clause of the Fourteenth Amendment because visitation cases are often factually intensive and adjudicated on a case-by-case basis. *Id.*

The New Jersey State Supreme Court concluded that the Grandparent and Sibling Visitation statute implicates a fundamental right, and thus it is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest. *Moriarty*, 177 N.J. at 114, 827 A.2d at 222. Furthermore, a grandparent must prove that visitation is in the child's best interests and also that the child will be harmed if the visitation requested is not granted, in order to overcome the presumption in favor of a parent's rights to make decisions in matters concerning his or her child. *Moriarty*, 177 N.J. at 115, 827 A.2d at 222. Once harm is proved and the presumption of parental fitness is overcome, the court must decide an appropriate visitation schedule based on the child's best interests. *Id.*

After analyzing and establishing the standard to be applied for grandparent visitation, the *Moriarty* Court compared a third party's application for the custody of a child to a third party's application for visitation. *Moriarty*, 177 N.J. at 116-17, 827 A.2d at 223. Although both applications implicate the right to the fundamental interests of family autonomy and privacy, the court opined that it would be unrealistic not to differentiate between the two. *Id.*

The court reasoned that an application to live with and take responsibility for a child certainly entails a greater level of family intrusion than an application to visit at shorter intervals. *Id.* Therefore, the court declined to apply the same evidentiary standard for the two, and reasonably declined to

require grandparents to prove by clear and convincing evidence the necessity for visitation to avoid harm to the children. *Id.*

The court concluded that a fit parent's decision should be afforded special weight, and where parents deny visitation, or offer inadequate visitation, the grandparent bears the burden of establishing by a preponderance of the evidence that visitation is in the best interests of the child as well as necessary to avoid harm to the child. *Id.* Hence, the court held that the best interests of the child test, combined with the harm standard, fully protects the fundamental rights of parents when faced with challenges from grandparents to visitation. *Id.*

The New Jersey State Supreme Court was not required under *Troxel* to apply a clear and convincing evidentiary standard. Under substantive due process, government decisions that affect liberty interests do not require a clear and convincing standard. The standard established by the New Jersey State Supreme Court is sufficient because it protects the fundamental rights of parents while also protecting children from arbitrary or misguided parental decisions.

This Court stated in *Mathews v. Eldridge*, that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." 408 U.S. 319, 321(1976) (*quoting Morrisey v. Brewer*, 408 U.S. 471 (1972)). Admittedly, while *Eldridge* dealt with procedural due process in a disability benefit termination, the lessons learned can be applied here as well. The *Eldridge* Court propounded three factors to be evaluated in deciding what due process requires. *Id.* These factors include: (1) the private interest that will be affected by the government action; (2) the risk of error created

by the State's chosen procedure; and (3) the government's interest in using the challenged procedure. *Id. See also Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 27 (1981).

A court's determination based on these factors may derive a constitutionally sufficient result in which the federal Due Process Clause is satisfied though an evidentiary standard lower than clear and convincing evidence is applied. *Moriarty v. Bradt* is one such example. The interests to be balanced are: (1) the interest of the parents in their fundamental right to raise their children as they see fit, as well as the well-being of their children; (2) the interest of the State in the welfare of its children and avoiding harm to them, fulfilling its duty as *parens patriae*, and promoting grandparent-grandchild relationships; and (3) the risk that the use of a preponderance standard will lead to erroneous decisions.

The New Jersey State Supreme Court made a deliberate, thoughtful decision to apply a preponderance evidentiary standard to grandparent visitation challenges, as opposed to the high "clear and convincing" standard applied in custody cases. *Moriarty*, 177 N.J. at 116-17, 827 A.2d at 223. It necessarily had to balance the interest in protecting parental autonomy with the interest in preventing harm to the children involved – two interests of great import. In combining the "best interests" standard with the "harm to the child" standard, the court minimized the risk that grandparents would be awarded visitation when it was not in the best interests of the child.

In selecting the "preponderance of the evidence" standard, the court allocates the risk of error equally to the parents and the grandparents, but provides two tests, in the form of two

standards, for the grandparents to pass. It is clear from the court's decision that it did not believe that grandparents should be required to clear as high a legal hurdle as a third party seeking custody would be required. *Moriarty*, 177 N.J. at 116-17, 827 A.2d at 223. By complying with *Troxel* and ensuring that parental autonomy was afforded due process protection through sufficient standards, the New Jersey State Supreme Court applied the appropriate evidentiary standard of review and it respectfully need not be reviewed by this Court.

CONCLUSION

The New Jersey Supreme Court made a constitutionally sound decision regarding grandparent visitation in *Moriarty v. Bradt*. The United States Supreme Court has recognized that state legislatures and state courts are the appropriate venues for the determination of the laws that govern the emotionally charged family law field in their respective states. The New Jersey Grandparent and Sibling Visitation Statute was not challenged on its face – and the New Jersey Supreme Court took care to ensure that sufficient tests were established for constitutional application of the state statute. The *Moriarty* court's grandparent visitation determination balanced the due process rights of the parents, with the rights of the grandparents and the state's goal of protecting the welfare of its children. Ultimately, preventing harm to the children was the *Moriarty* court's polestar, which resulted in a fair determination of visitation with their grandparents.

Accordingly, this case does not merit further review by the Honorable Court. For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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